BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 18-22).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 23). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented, Specification of Errors to be Urged, and Statement of the Case.

A statement of the questions presented, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

The Court of Claims failed and refused to make special findings of fact requested by petitioner, based on undisputed evidence, so material and indispensable that, if made, they would have entitled petitioner to judgment, as required by Rule 41 of this Court, and it also made findings on material questions both contrary to the evidence and with no evidence to sustain them.

The findings of fact requested but refused are set out under I of the Specification of Errors to be urged, and those contrary to the evidence or without evidence to sustain them are set out under II of said Specification of Errors.

The refusals to find and erroneous findings may be classified under 4 heads, viz,—

(1) Violations by respondent of agreements in the contract;

(2) The showing of drains in the map exhibited to petitioner entitling him to assume that they would be sufficient to drain the site;

(3) Concealments and failures to disclose;

(4) Misrepresentations and unforeseen conditions.

These points are urged separately as follows,—

(I) *Respondent violated its agreement,*

"That no artificial obstruction shall be encountered".
(Sec. 2-01 Spefctns. p. 7; R. 13.)

(a) There were inadequate and improperly constructed culverts over the main ditch (Rspdt's. Engnr. Davies, R. 31; R. 24, 26), which backed up the water and hindered the drainage of the site, and caused floods (R. 24-26); water remained 2 feet above the ground 12 hours after a rain (Davies, R. 29; R. 26), and it rained 14 days in each of the months of August and September, 26 days in October, and 27 days in November (Deft's. Ex. Y); it was necessary to use pumps 2086 hours,—260 eight-hour days (Deft's. Ex. Y; Fogg R. 37); the work was impeded, hindered, and delayed through the floods, making it almost impossible, as the men would be up to their waists in mud (R. 25, 26), making machine work impossible, and making it necessary to do the work by hand (R. Id., 28), and resulting in the loss of $26,796.54 by petitioner (Specification of Errors 10, 17-b). (* Specification of Errors hereinafter called S. E.).

(b) The court refused to find the facts above stated (S. E. 7).

The claim is for the damages growing out of this violation of contract.

(a) The inadequate and improperly constructed culverts constituted an obstruction, and a breach of the contract, entitling petitioner to judgment.

(*Commonwealth* v. *Erie Etc. R. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471, 477; *Gorham* v. *Withey*, 52 Mich. 50, 17 N. W. 272; *Patterson* v. *Vail*, 43 Iowa 142, 145; *Ladd v. Wilson*, 14 F. Cas. 926; *The Swan*, 19 Fed. 455; *Funk & Wagnalls New Standard Dictionary; Hollerback* v. *U. S.*, 233 U. S. 165; *Christie* v. *U. S.*, 237 U. S. 234; *U. S.* v. *Spearin*, 248 U. S. 132; *U. S.* v. *Behan*, 110 U. S. 338.)

The refusal to find the facts above stated was in conflict with the Rule of this Court (Rule 41).

(II) *Drainage ditches were shown on the map exhibited to petitioner, entitling him to assume that they would be adequate to drain the site.* (Plf's. Ex. 5; Deft's. Ex. T; Fogg R. 38.)

This was emphasized by Fogg (Respondent's officer in charge), who stated, on the inspection trip that the Panama Canal was extending its drainage system there (Fogg R. 36, 43).

The court below refused to find these undisputed facts (S. E. 3).

Fogg's assurance could have no other effect, and was obviously intended to lead petitioner to believe that the ditches would be adequate to drain the site. The showing of the map alone, which misled petitioner to his prejudice, was strengthened by Fogg's assurance.

The petitioner suffered large damages through the ditches failing to be adequate, which he is entitled to recover.

> "A contract for clearing and concreting the bottom of a park lake * * * contained provisions that the contractor should drain off all water * * *. There

> was an outlet pipe in the bottom of the lake, the gate of which only was visible on the contractor's personal examination * * *, but on his attempting to draw off the water thereby, * * *, the underground pipe * * * failed to remove the water for a considerable depth. The contractor was * * * compelled to pump out the water, and * * * he claimed to recover * * * as for extra work. *Held,* * * * that he could properly assume that the water could be discharged through the outlet * * *; and that he was entitled to recover * * * the cost of pumping necessitated by the failure * * * to have the outlet pipe in working order." *Horgan* v. *The Mayor,* 160 N. Y. Rpts. 516; *Norrington* v. *Wright,* 115 U. S. 188).
>
> "* * * the contractor should be relieved if he was misled by erroneous statements in the specifications," (or, as here, in a map). (*U. S.* v. *Spearin,* 248 U. S. 132, 136.)

The failure of the court to find the facts above stated was in conflict with the Rule of this Court (Rule 41).

(III) *Respondent concealed and failed to disclose material facts as to the site, resulting in the loss by petitioner, which he is entitled to recover.*

(a) The contract provides,—

> "They" (the bidders) "will be furnished with such additional information as is available by the local Government representatives." (Par. 7 of Gen. Provns.; R. 14.)

(b) Respondent exhibited a map to petitioner not indicating that the site was swampy (Plf's. Ex. 5; R. 24), when respondent had made and had another map showing these conditions (Plf's. Ex. 6; Fogg R. 37; R. 24), but not shown petitioner until months after the work was started (R. 24; S. E. 1).

(c) Fogg, the officer in charge, knew the site thoroughly (R. 39), but failed "to furnish petitioner this available information", but led him to believe that the site would not be difficult to work in (R. 24, 25).

(1) Fogg knew that the ditches were to take off flood waters and prevent frequent slides (R. 40); that they would not drain the site (R. 40; that it would be difficult to work in (R. 38, 43), inadequately drained (R. 40, 43), collect water and be flooded (Id.), yet the only definite thing he told the bidders was that the drainage system was being extended (R. 36, 43).

(2) Gillogly, petitioner's employee at the time, but not when he testified, and disinterested, swears that Fogg said that the main new drainage ditch was put in for the drainage of the area, and would be adequate to take care of the water, and other lateral drainage ditches were now being opened * * * which would take care of the water conditions" (R. 23, 25).

(3) Fogg denies this, but he made so many contradictory statements on material facts that his testimony is not entitled to any weight. (*Hom Dong Wah* v. *Weedin*, 24 F. (2d) 774, 775.) He testified,—

(a) As stated above, that he was familiar with the lack of drainage; and, to the contrary, that he had no belief as to its adequacy (R. 39, 40).

(b) That the amount of rainfall was unknown (R. 41), and, later, that it averaged 10 inches a month from May to October, and 15 inches from the middle of October to the last of November (R. 41).

(c) That having special knowledge and special equipment, it is about as easy to work land under as above water, and, later, that it is more expensive and takes more time (R. 41).

(d) That "I ventured no information on it" (the site) (R. 39); "I felt that if they wanted that information" (as to the rainfall), "they could get it themselves as best they could" (R. 41); and, to the contrary, "I think I told them about the rainfall" (R. 41), "I gave them as full and complete information as I could" (R. 38, 43).

Fogg must have knowingly testified incorrectly in one version or the other of each of the above four matters.

Again Fogg testified, (as though there), to the cause of the cave in (R. 35), but he was in the hospital from July 21st, when driving sheet piles started, till August 15th, when the cave in occurred (Deft's. Ex. Y; R. 38).

Again he testified that the work was not opened up fast enough (R. 37), but excavating was started July 18th on the 300-foot towers, which were finished on time, and on the 600-foot towers on July 21st, and he was in the hospital then (Deft's. Ex. Y; R. 38).

(e) Fogg admits, as shown, that he ventured no information on the site (R. 39),—that although he had complete information available, he did not furnish it to petitioner (R. 39, 40), on which admission petitioner has the right to rely, (3 Wigmore, § 1457, p. 191).

(4) The inspection trip afforded no material information as to the site, and was misleading (R. 25, 43).

Fogg testified,

> "We skirted around the edge of the swamp as anyone would trying to keep from getting mired down" (R. 43).
>
> "All of the tower sites at that time had very high guinea grass, much of it 6 to 8 feet high. I had a native trail cutter cut a trail for us (R. 35). I would not call it" (the grass) "impenetrable. You could get through it if you wanted to, but you would probably get lost if you tried to go any distance through it" (R. 42).

The inspection was made in May, and the heavy rains did not occur until October (Davies R. 28, 29; R. 14; Fogg R. 41).

One McMenimen stated that he could see over the site, but his visit was July 17th, after two weeks spent clearing it (Deft's. Ex. Y; R. 44), and when the grass left, was only one foot to 18 inches high (R. 45). This is no evidence that the site could be seen before the clearing, and with the grass 6 to 8 feet high (R. 35).

The court below refused to find these facts, contrary to Rule 41 of this Court (S. E. Nos. 2, 4, 8).

Respondent's failure to furnish its available information, (here especially as it agreed to do so), renders it liable to petitioner for his loss.

(*U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1; *U. S.* v. *Gibbons*, 109 U. S. 200; *Christie* v. *U. S.*, 237 U. S. 234; *Passaic Valley Etc.* v. *Holbrook* * * * *Corp.*, 6 F. (2d) 721, 724; *U. S.* v. *Spearin*, 248 U. S. 132, 124, 135).

(IV) *Respondent made material misrepresentations as to the site, and unforeseen subsoil conditions developed, causing damage, which petitioner is entitled to recover.*

(a) 180 piles were driven. Their lengths were shown in the Specifications (Plf's. Ex. 2. Addendum 2, p. 1), but 91 of those were incorrect, necessitating exchanges between sites over ground so soft that mats had to be used (R. 31, 25, 28), trucks mired and had to be pulled out, and at times material had to be unloaded and carried by hand (R. 25, 28), making the work difficult and expensive. The piles required at site 6 were so much longer than specified that others had to be ordered, causing a six weeks delay beyond the completion date (R. 25, 31), and into the extremely heavy rainy season (Deft's. Ex. Y. October 7th to December 1st).

The court below refused to find these facts, although undisputed (S. E. 6).

Changing the lengths of 91 out of 180 piles proves that the depth to which the subsoil was unstable was unforeseen by the parties, and respondent misstated conditions as to this, and petitioner is entitled to recover his loss through these unforeseen conditions. (*Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls. 461; *Sobel* v. *U. S.*, 88 Ct. Cls. 149, 165; *Hollerbach* v. *U. S.*, 233 U. S. 165, 172).

This was also a complete change from the contract work, which entitles petitioner to recover on a *quantum meruit.* (*Clark on Architect Owner & Builder,* p. 291; *Waste in Industry,* p. 72; *8th Annual Housing Convention,* p. 253, 254,—Limiting Waste; *Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls. 466, 476; *Sobel* v. *U. S.*, 88 Ct. Cls. 149, 165).

(V) *Petitioner suffered a loss of $26,796.54 through respondent's violations of its contract and its concealments of and failures to disclose, and misrepresentations of material facts as to the site, and through unforeseen conditions, but the Court below refused to find these facts, in conflict with Rule 41 of this Court.*

(1) That petitioner suffered a loss of $26,796.54 is undisputed (R. 27; Plf's. Ex. 7).

(2) This loss arose from the site being more difficult to work in than respondent represented and agreed it would be:—

Fogg, respondent's officer in charge, states,—that petitioner's "headway was greatly impeded by the fact that the area was boggy, swampy, and in consequence he had great difficulty in getting over it, and doing his work in it" (R. 43). "If the site had been thoroughly drained, the problem of building the tower foundations would have been much simpler" (R. 42).

Gillogly swore, "At tower No. 6, 80% of the time was lost on account of water conditions (R. 24); we were mired down

at almost every point we approached on these towers (R. 24); 3600 lineal feet of road were made necessary; if the soil had been as represented we would have completed the contract within the contract time" (R. 25).

Nelson swore, "In September my men would sink to the waist in the mud trying to hand up mud, and it was hard to make any progress at all. Water and mud was constantly flowing into the holes, every hour of the day. The water would back up at the culvert" (R. 25).

The extra roads cost between $6,000 and $8,000 (R. 26).

(3) *Respondent made no substantial or definite proof that petitioner's loss arose otherwise than as above described.*

(a) Fogg and Davies testified for respondent that petitioner's equipment was inadequate (R. 41, 36, 29, 30), but neither of them stated how or in what respect, and neither of them was qualified as an expert, and their testimony is, therefore, of no value (20 Am. Jur. § 813, p. 683).

Davies claims that petitioner should have had an extra set of equipment for breakdowns (R. 29, 30), but the work lasted 223 days, with equipment under repair only 12 days, and part only at a time (Deft's. Ex. Y.); Davies admits that occasional breakdowns were to be expected (R. 33), and the breakdowns here were not even occasional, but rare, in spite of conditions ruinous to machinery.

Fogg said that the equipment was inadequate to finish the work in time (R. 36, 41). He was in the hospital from July 15th to October 15, 1934 (R. 38). He first visited the job November 2, 1934 (R. 38). Then 5 of the 9 towers had been completed, and No. 4 was finished November 28, 1934 (R. 16). Fogg made no criticism of the equipment or otherwise until December 18, 1934 (Deft's. Ex. D). The work was then nine-tenths done. Much work could not be

done with machinery, but that had to be done by hand (R. 25, 26, 28).

Davies charges petitioner with delays, (1) from the caving in of sheet piling at site 6-C (Deft's. Ex. Y, Sept. 13th), but this was due to petitioner's relying on respondent's wrong estimate that it was necessary to drive the foundation piles only ten feet (Plf's. Ex. 2, Addendum 2), whereas stable ground was only reached much lower (R. 32, 31); (2) while petitioner was trying diligently to pull a shovel out of the mud into which it and the mat under it sunk; and (3) with minor delays, but Davies does not claim that petitioner was not doing other work the times charged as delays (R. 33), and the inspector's reports show that he was.

Nor does Davies claim that progress of the work was delayed by failure to work on all branches of it at the same time (Deft's. Ex. Y, August 15th-September 13th).

Moreover, Davies was not qualified as an expert or by adequate observation to testify as to these alleged delays. (20 Am. Jur. § 813, p. 683.)

Respondent caused a delay to six weeks after the completion date through underestimating the lengths of site 6 piles (R. 25, 31), and also from September 1st to the 10th (Plf's. Ex. 16).

(b) Fogg and Davies claim that two crews should have worked simultaneously, but they did, and, at times, more than two (R. 15; Deft's. Ex. Y), and Fogg testified that petitioner had enough men (R. 37).

(c) Petitioner is entitled to recover his expenditures, as respondent did not show that they were extravagant, or unnecessary (*U. S.* v. *Behan*, 110 U. S. 338, 344, 345).

(d) Had the equipment been unequal to the difficulties encountered, but not anticipated by petitioner as he was misled as to the site, delays therefrom could not be charged to him. (*U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1.)

(d-1) Respondent's failure to call its inspector raises the presumption that he would have testified that the equipment was adequate, and that petitioner was not chargeable with delays, but proceeded with reasonable diligence (9 Cyc. of Ev. 967). This is emphasized by calling instead Fogg, who had no adequate opportunity to observe (14 Cyc. of Ev. 175).

(e) The refusal of the court below to find that petitioner suffered a loss of $26,796.54 was in violation of Rule 41 of this Court (S. E. 17-b).

(f) The change orders (Deft's. Exs. A, C) are not involved: The prices paid under them covered the work done and material used in the changes, but nothing for the consequential delays and increased cost they caused, to which petitioner is entitled (*Rust Engineering Co.* v. *U. S.*, 86 Ct. Cls., p. 466; *Sobel* v. *U. S.*, 88 Ct. Cls. 149, 165).

(VI) *The Court erroneously found the release binding as to claims for damages outside the contract* (*S. E. 17-b*).

(a) The release is not binding as to the damages because petitioner could only get a payment then due by signing it: Fogg said—"no change order, no money" (R. 37); it was equally true that "no release, no money", and petitioner had to have the money for his payroll; he had no other means of meeting it. He had $18,874.96 tied up in the work. His pay had been held up two months (R. 27). (*Ingram* v. *Lewis*, 37 F. (2d) 259; cases quoted 70 A. L. R. 711; 84 A. L. R. 296 to 298 incl., and 64 A. L. R. 121, 122; *Hanson* v. *Fowler*, Fed. Cas. No. 6042, Vol. II, p. 469, 471; *Dunbar* v. *U. S.*, 65 Ct. Cls. 567).

(b) When the release was executed only what it admitted as due on the contract was paid by respondent,—nothing for the damages outside the contract, and the release should

not be extended to the damages but be confined to what was paid.

(*Fire Ins. Co.* v. *Wickham*, 141 U. S. 564; *Piatt's Admr.* v. *U. S.*, 89 U. S. 496; *Atlantic Greyhound Lines* v. *Metz*, 70 F. (2d) 166; *Alexander Kiskadden, Admr.* v. *U. S.*, 44 Ct. Cls. 205; *Nelson* v. *Chicago Mill, Etc., Co.*, 76 F. (2d) 17, 24; *Plato* v. *U. S.*, 86 Ct. Cls. 665, 678; *Pneumatic Gun Carriage & Power Co.* v. *U. S.*, 36 Ct. Cls. 71; *Sanborn* v. *U. S.*, 46 Ct. Cls. 254; *Sheridan-Kirk Contract Co.* v. *U. S.*, 53 Ct. Cls. 82; *3 Williston on Contracts* (Revsd. Ed.) § 619, ps. 1784, 1785; *4 Pages on Contracts*, §§ 2451, 2452, ps. 4343, 4344).

(c) The release was given pursuant to a provision of the contract that the contractor shall release "all claims * * * other than such claims * * * as may be specifically excepted * * *" (Plf's. Ex. 1, p. 6).

(1) This provision securing petitioner the right to except his claim for damages should be given effect (*Woolworth Co.* v. *Peterson*, 78 F. (2d) 47).

(2) Failure to except should not be held to have defeated this claim because it would be,—

(a) Unequal and unjust (*Knowlton* v. *Moore*, 178 U. S. 41, 77);

(b) That its performance is impossible, which should be avoided (*E. I. DuPont DeNemours & Co.* v. *Clairborne-Lens Co.*, 64 F. (2d) 224, 228);

(c) In conflict with the purpose of the provision, whereas it should subserve it (*Legal Tender Cases;* 2 Wall. 457);

(d) On account of failure to give notice of the claim through excepting (obviously the purpose of excepting), but petitioner had given notice through previous repeated protests that the contract price and time were inadequate (R. 26, 27; Plf's. Ex. 8), and there is no proof that respond-

ent suffered through an exception not being made at the time of the release (*Am. Ship Bldg. & Dock Corp.* v. *John Rourke & Sons,* 4 F. (2d) 845, 846).

(c) A forfeiture when it is not clear from the language of the provision that the parties provided for a forfeiture (*17 C. J. S.* § 320, ps. 742, 743; *Texas Co.* v. *Pensacola, Etc., Corp.,* 279 F. 19, 26, 27; *Gen. Contracting Co.* v. *Grignon,* 255 F. 952, 954).

(VII) *The Court of Claims Erred in Refusing to Find That the Contract Provided That Petitioner Should Not be Charged With Liquidated Damages Because of Delays in Completing the Work Due to * * * Floods * * * (Contract Art. 9, p. 5; Plf's. Ex. 1); and That Floods Delayed the Work, Making it Almost Impossible, and That Petitioner Would Have Completed the Work in Time But for Floods (S. E. 9; (b), (d) of S. E. 10; S. E. 15), and in Sustaining the Assessment of $3,950 of Liquidation Damages. (S. E. 17-b).*

(1) (a) The contract provision above cited exempted petitioner from liquidated damages for delays due to floods; and

(b) There were floods throughout the time the work was done, which delayed the work. (Pt. I (a) hereinabove.) Fogg knew that the site would be flooded (R. 39, 40, 43).

(2) Respondent, through inadequate culverts; through showing drains on its map (with petitioner's right to assume them sufficient), which were inadequate; and through failure to disclose its full knowledge of the site, and misrepresenting it—in each instance breached the contract, and caused the delays (Pts. I, II, and III above), and it can not therefore retain anything as damages.

(3) Respondent granted extensions for delays which it caused, and the parties did not at the time or ever fix the

damages for delay or until long after the work was finished attempt to fix the time for completion after the extended periods (Change Order, Deft's. Ex. B), and respondent can not recover these damages, if any, outside it, under the contract stipulation, and can not recover other damages because it proved none. (*U. S.* v. *United Engineering & Co.,* 234 U. S. 236, 242.)

(4) This work was completed in February 1935, but no attempt to use the towers was made until 1936 (R. 34).

As the delay was no injury, respondent is not entitled to damages (*Scott* v. *Donald,* 168 U. S. 58).

(5) Had petitioner been chargeable with part of the delay, as respondent admits that it delayed the work, petitioner cannot be assessed damages: The courts will not apportion the delays (*Bethlehem Steel Co.* v. *U. S.,* 75 Ct. Cls. 845; *Caldwell & Drake* v. *Schmulbach,* 175 Fed. 429, 434; *Vilter Mfg. Co.* v. *Tygart's Valley Brewing Co.,* 168 Fed. 1002; *U. S.* v. *United Engineering Co.,* 234 U. S. 236).

(VIII) *The court below erred in making special findings of fact, and in making ultimate findings not substantiated by the findings of evidentiary or primary facts (S. E. II), as follows:*

(1) "The party proceeded to the site of each tower and viewed the existing conditions" (Find. No. 4; R. 14), which (as shown under Pt. I (d) above) is in error, and conflicts with this finding and with Fogg's testimony that Towers 3-A, 4 and 6 were in the marsh, and "that the party did not venture on marshy ground" (R. 15, 39, 43).

(2) "All the sites had sufficient access thereto for inspection was made possible by a trail cut through the grass by a native using a machete" (R. 15), which is erroneous ((d) of Pt. III).

(3) "The contractor based his bid on the inspection thus made * * *. Defendant's officers made no representation * * * that the site was otherwise than it appeared to be and concealed no material fact * * *," (R. 15), which is erroneous ((c) of Pt. III, Pt. IV). Also petitioner based his bid on the inspection trip, and the maps, drawings, and contract (R. 27).

(4) "The buckling of the sheet piling * * * could have been avoided by a more efficient form of cofferdam, and the use of shoring" (R. 15), which is erroneous (Pars. 4, 5, (a) of (3) of Pt. V).

(5) "The miring of petitioner's shovel delayed the progress of the work," (R. 16), which is erroneous (Id.).

(6) "The contractor consumed more time * * * than estimated * * * by lack of equipment adequate for the conditions actually encountered, breakdowns * * *, and the failure to * * * work more vigorously. The delays * * * threw the work into * * * dry weather * * *, during which * * * the work could be done faster than during the rainy season," (R. 17, 18), which is erroneous (Id.).

Also the delays in inspecting wire (R. 16), in making tests at sites 1 and 6 (R. 32), in exchanging piles between sites (R. 25), and in procuring new piles from the United States, alone prevented completing the work on time, October 7, 1934 (R. 12, 25), and threw it into the worst rainy season—it rained 26 days in October and 27 days in November (Deft's. Ex. Y). Respondent admits 45 days of the above delays (R. 16), and that the new piles required from the United States ordered October 13th (Plf's. Ex. 10), did not arrive until November 20, 1934 (R. 31).

(7) "For all delays occasioned by the Government there has been given the contractor adequate extensions of time

for performance, together with fair and reasonable compensation" (R. 17), which is immaterial. The material used and the time taken in changes were paid for but nothing was paid for the consequential delays and added expense ((f) of Pt. V).

(8) "There is no proof that the decision of the Secretary of the Navy, on appeal, was mistaken in matters of fact," (R. 17), which is erroneous (Plf's. Ex. 5, Pts. I, II, III, and IV), and the Secretary had no jurisdiction over the issue here as to damages, outside the contract, and appeal to him was unnecessary (*Phoenix Bridge Co.* v. *U. S.*, 85 Ct. Cls. 603, 630).

(IX) *The court below erred in making its conclusions of law* (R. 17, 18), *and in failing to render judgment for petitioner, as shown under the Points above.*

(X) *The court below erred in making the findings in its opinion as listed under specification of errors IV, as shown by the Points above in this brief. "The special findings may not be aided by statements in the * * * opinion of the Court * * *"* (*U. S.* v. *Esnault-Pelterie*, 299 U. S. 201, 206).

Conclusion.

(1) Inadequate culverts across the main ditch backed up the water and kept the site flooded. They were artificial obstructions, bringing delay and loss for which respondent is liable for breach of its agreement that such obstacles would not be encountered. Water stood 2 feet above the ground 12 hours after a rain (R. 26, 29). It rained the following number of days each of the following months: 14 in August; 14 in September; 26 in October; 27 in November (Deft's. Ex. Y). Pumps had to be used 2086 hours—260 eight-hour days (through use night and day), on a job that took only 223 days (Id. Pt. I above).

(2) On the contract map drains appeared, which Fogg said were being extended. Petitioner had the right to assume that they would drain the site. They failed to do this, causing delays and loss, for which respondent is liable (Pt. II above).

(3) Fogg, the officer in charge, knew that the site would be flooded and difficult to work in, but he failed to disclose the facts to petitioner, and violated respondent's agreement that he would furnish petitioner this available information, also causing petitioner delays and loss, and for this breach of agreement respondent is liable to petitioner (Pt. III above).

(4) The parties did not know the depth to which the unstable conditions of the soil descended. Respondent underestimated it in the specifications, misleading petitioner, and necessitating driving 91 out of 180 piles deeper than specified, exchanging piles between sites over soil so unstable as to be subject to slides, causing delays and added expense. Because of this most substantial change in the work, and of an unforeseen and far more difficult subsoil to excavate than could be inferred from the specifications, respondent is liable to petitioner for his loss (Pt. IV above).

The court below refused to find any of these highly material facts, based on undisputed and indisputable evidence, or the conclusions of law to which they entitle petitioner, in violation of Rule 41 of this Court. We respectfully submit that this petition should be granted.

S. Wallace Dempsey,
Bruce Fuller,
Attorneys for Petitioner,
723 Investment Building,
Washington, D. C.

(1918)